

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant : Jan Andersson et al.  
Serial No. : 10/673,689  
Filed : September 29, 2003  
Title : INHALATION DEVICE

Art Unit : 3772  
Examiner : Nihir B. Patel  
Conf. No. : 1299

**Mail Stop Appeal Brief - Patents**

Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

REPLY BRIEF

Pursuant to 37 C.F.R. § 41.41, Appellants responds to the Examiner's Answer as follows

In the Examiner's Answer mailed December 18, 2008, the Examiner withdrew the previous ground for rejection and set forth a new ground of rejection. Because this new ground of rejection is also based on the previously applied reference of U.S. Patent No. 5,033,463 ("Cocozza"), Appellants request that the appeal be maintained.

On page 3, lines 17-18 of the Examiner's Answer, the Examiner newly rejects claims 34, 35, 37-39, 41, and 73 under 35 U.S.C. § 103(a) as being obvious over Cocozza. Previously, the Examiner asserted that claims 34-39, 41, and 73 were anticipated by Cocozza. Appellant will now explain why the new grounds of rejection should be reversed.

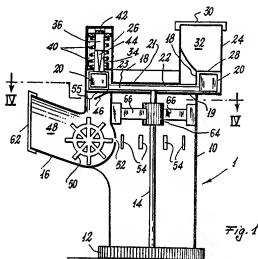
*Claims 34, 35, 37-39, 41 and 73 Are Patentable Over Cocozza Under 35 U.S.C. 103(a)*

Appellants' claims require that a powder dislodging member (claim 34) or scraper (claim 35) or brush (claim 73) be "configured...to contact the at least one of the surfaces of the flow path such as to dislodge powder accumulated thereon." This contact allows accumulated powder to be dislodged from surfaces of the flow path on which the powder has accumulated. The Examiner now acknowledges that Cocozza "does not disclose contacting the other of the at least one or at least one other of the surfaces of the flow path such as to dislodge powder accumulated thereon, wherein the powder dislodging member comprises on of a scraper or a brush." Examiner's Answer, page 4, lines 8-10.

The Examiner, however, now alleges that "[i]t would have been obvious to one having ordinary skill in the art at the time the invention was made to modify Cocozza's invention by providing an impeller that comes very close to touching if not touching the surface of the flow

path in order to remove the accumulated medicament in the flow path.” Examiner’s Answer, page 4, lines 10-13. For the reasons given below, Appellants respectfully disagree.

Cocozza discloses a disintegrating device that “can be of rotatable type (such as a rotatable impeller).” Cocozza, col. 4, lines 48-50. The embodiment shown in Fig. 1 (reproduced below) includes a rotatable impeller 50 that is rotated by the flow of air as the user breathes in (see Cocozza, col. 7, lines 12-19). The powder that has fallen on the impeller from above this thus entrained in the air flow and delivered.



The clearance shown between Cocozza’s impeller 50 and the adjacent wall is consistent with the need for Cocozza’s impeller to be rotated by the intake breath to entrain the medicament. It would have been understood by anyone of ordinary skill, upon reading Cocozza’s disclosure, that configuring impeller 50 to scrape the wall would be contrary to its intended purpose, by significantly reducing its rotatability. Nor would there have been a clear reason for one of ordinary skill to want to modify Cocozza’s impeller to scrape the wall as suggested, as Cocozza’s impeller is positioned such that the dose of powder falls “onto the impeller 50” (Cocozza, col. 7, line 19) and not onto the underlying wall surface.

Cocozza shows a second embodiment in Figure 10, in which agglomeration disintegration is performed by a helical device “of fixed type” (Cocozza, col. 10, line 10; i.e., not

rotatable) that extends across the channel and thus creates a turbulence that breaks up large conglomerations. Cocozza does say with respect to this embodiment that other disintegration means such as a rotating impeller could be used" (Cocozza, col. 10, lines 16-17), presumably an impeller of the type shown in Figure 1 and discussed above. In either case, there is nothing about either of Cocozza's arrangements that would have led someone of mere ordinary skill toward the idea of contacting (e.g., to scrape) the wall.

Because an artisan having ordinary skill in the art would have (1) recognized that the asserted modification would undermine the stated function of the impeller of Cocozza, and (2) had no reason to make the modification in the first place, that artisan would not have been led to make Cocozza's impeller "configured . . . to contact" the adjacent wall. Accordingly, the new rejection under 35 U.S.C. § 103(a) is also improper and should be reversed.

Appellants also object to the Examiner's argument that an impeller "that is inches from touching . . . the flow path" would meet the claim requirements. See Examiner's Answer, page 6, lines 5-8 & page 4, 12-13. The claims require that the powder dislodging member (claim 34) or the scraper (claim 35) or brush (claim 73) be "configured...to contact the at least one of the surfaces of the flow path such as to dislodge powder accumulated thereon." Spaced inches from touching does not qualify as "configured . . . to contact," as recited in the claims.

On page 6, lines 3-4 of the Examiner's Answer, the Examiner asserts that "nowhere in the Cocozza's reference does it state that the drawings are to scale, therefore, the argument that the impeller 50 shown in figure 1 not contacting the wall of the flow path should not be considered." Appellants disagree. While the drawings are not necessarily to scale, the drawings do show the relative relationship between different parts. There is no indication that any part of the impeller of Cocozza is "configured . . . to contact" the adjacent wall and the drawings further support the Appellants' argument that the disintegrating impeller of Cocozza would not perform its intended function if it was "configured . . . to contact" the adjacent wall. Furthermore, the Examiner's argument is based on a *non sequitur*; it does not follow from the recognized doctrine that patent drawings are not assumed to be to scale that the drawings can therefore be taken to teach whatever geometric or spatial relationship might be helpful in rejecting a claim. The

relevant point is simply that Cocozza does not disclose, under any reasonable interpretation, impeller-wall contact – either in the text or in the drawings.

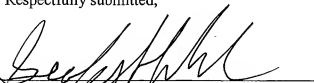
**With regard to claim 73**, Appellants maintain that, in addition to the reasons advanced above, claim 73 is patentable because Cocozza's rotating impeller cannot reasonably be interpreted as a brush. The Examiner's Answer does not address this element and does not provide any reason for why it would be obvious to substitute one or more brushes for the vanes of the impeller of Cocozza. "[R]ejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness." *KSR Int'l Co. v. Teleflex Inc.*, 127 S.Ct. 1727, 1741 (2007) (quoting *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006)). Because the Examiner has failed to address why it would be obvious to add the claimed "brush" of claim 73 to the device of Cocozza, the rejection of claim 73 over Cocozza under 35 U.S.C. § 103(a) cannot be maintained. Furthermore, such a substitution would not have been obvious to one of ordinary skill, as the powder dose of Cocozza falls on the impeller and one of ordinary skill may have considered a smooth impeller surface most conducive to powder delivery.

For these reasons, Appellants submit that the new grounds of rejection set forth in the Examiner's Answer should be reversed.

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Respectfully submitted,

Date: 2/4/09

  
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